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 Holding Co. Inc.; K-M Industries Holding Co.
 Inc. ESOP Plan Committee; and CIG ESOP
 Plan Committee

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

THOMAS FERNANDEZ, LORA SMITH
 and TOSHA THOMAS, individually and on
 behalf of a class of all others similarly
 situated,

Plaintiffs,

v.

K-M INDUSTRIES HOLDING CO., INC.;
 K-M INDUSTRIES HOLDING CO. INC.
 ESOP PLAN COMMITTEE; WILLIAM E.
 AND DESIREE B. MOORE REVOCABLE
 TRUST; ADMINISTRATOR OF THE
 ESTATE OF WILLIAM E. MOORE,
 DECEASED; CIG ESOP PLAN
 COMMITTEE; NORTH STAR TRUST
 COMPANY; DESIREE B. MOORE
 REVOCABLE TRUST; WILLIAM E.
 MOORE MARITAL TRUST; WILLIAM E.
 MOORE GENERATION-SKIPPING
 TRUST; and DESIREE B. MOORE, BOTH
 IN HER INDIVIDUAL CAPACITY AND
 AS TRUSTEE OF THE WILLIAM E. AND
 DESIREE B. MOORE REVOCABLE
 TRUST'S SUCCESSOR TRUSTS NAMED
 ABOVE,

Defendants.

) Case No. C06-07339 CW

) **NOTICE OF MOTION AND**
) **MOTION FOR SUMMARY**
) **JUDGMENT BY DEFENDANTS**
) **K-M INDUSTRIES HOLDING**
) **CO., INC., K-M INDUSTRIES**
) **HOLDING CO. INC. ESOP PLAN**
) **COMMITTEE AND CIG ESOP**
) **PLAN COMMITTEE;**
) **MEMORANDUM OF POINTS**
) **AND AUTHORITIES IN**
) **SUPPORT**

) Hearing Date: July 31, 2008

) Hearing Time: 2:00 p.m.

) Courtroom: 2, 4th Floor

) Judge: Hon. Claudia Wilken

1 TO PLAINTIFFS THOMAS FERNANDEZ, LORA SMITH AND TOSHA THOMAS AND
2 THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on July 31, 2008 at 2:00 p.m. or as soon thereafter as this
4 matter may be heard by the Honorable Claudia Wilken at 1301 Clay Street, 4th Floor, Courtroom 2,
5 Oakland, California, defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co., Inc.
6 ESOP Plan Committee and CIG ESOP Plan Committee will and hereby do move this Court for
7 summary judgment against all of plaintiffs' claims.

8 This motion seeks the dismissal of all of plaintiffs' claims on the grounds that they are each
9 barred by the statute of limitations.

10 This Motion will be based on this Notice of Motion, the attached Memorandum of Points
11 and Authorities, the concurrently-filed Declarations of Henry I. Bornstein, Peter M. Cazzolla,
12 Joseph Cristiano, Stephen Ferrari and Dan Stritmatter in Support of K-M Industries Holding Co.,
13 Inc., K-M Industries Holding Co., Inc. ESOP Plan Committee and CIG ESOP Plan Committee's
14 Motion for Summary Judgment, and such other evidence that may be presented at or prior to the
15 hearing on this Motion.

16
17 DATED: June 26, 2008

LOVITT & HANNAN, INC

18
19
20 By: 

Henry I. Bornstein

21 Attorneys for Defendants K-M Industries Holding
22 Co., Inc. and K-M Industries Holding Co., Inc.
23 ESOP Plan Committee
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs filed their original complaint in November 2006. The complaint concerns two transactions that occurred in October 1998 and October 1999, more than six years before the complaint was filed. In these transactions, the KMH Employee Stock Ownership Plan ("ESOP") purchased a 42% ownership interest in K-M Industries Holding Co., Inc. ("KMH") in the form of two classes of stock designed to track the performance of two of KMH's operating subsidiaries: Kelly-Moore Paint Company ("K-M Paint") and Capital Insurance Group ("CIG").¹ Plaintiffs are former employees of K-M Paint and CIG who are participants in the ESOP.

The gravamen of plaintiffs' Complaint is that the ESOP paid more than fair market value for the shares. As stated by Plaintiffs' counsel in a brief recently filed in this action, "the basic allegation in this case [is] that the ESOP paid too much for the stock at the time of the initial transactions." Reply Brief in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, filed June 19, 2008.

Specifically, plaintiffs allege that the two stock sales were "prohibited transactions" under the Employee Retirement Income Security Act ("ERISA") because the ESOP paid more than fair market value for the shares (29 U.S.C. §§ 1106, 1108(e)), and that the defendants breached their fiduciary duties under ERISA by allowing a sale to the ESOP in excess of fair market value. 29 U.S.C. § 1104.

Except in the case of "fraud or concealment," a "statute of repose" applies to plaintiffs' claims that provides that they may not be brought later than:

[S]ix years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation,

29 U.S.C. § 1113(1).

It is undisputed that the ESOP sales transactions each occurred considerably more than six years

¹ The latest version of plaintiff's complaint is the Second Amended Complaint – Class Action (Corrected) ("Complaint"), filed January 18, 2008.

1 before the original complaint was filed. The original complaint was filed on November 29, 2006.
 2 The six-year statute ran on October 12, 2004 as to the sale of the "P" stock that tracked the
 3 performance of the K-M Paint subsidiary because the "last action which constituted a part of the
 4 breach" was the completion of the sale of the "P" stock on October 13, 1998. The six-year statute
 5 ran on October 17, 2005 as to the sale of the "I" stock that tracked the performance of the CIG
 6 insurance company subsidiary because the "last action" was the completion of the sale of the "I"
 7 stock on October 18, 1999.

8 Because there is no evidence of "fraud or concealment," each of plaintiffs' claims is barred
 9 by the applicable six year statute of repose.

10 **II. FACTUAL BACKGROUND**

11 **A. THE MOVING PARTIES AND FORMATION OF THE ESOP**

12 The Kelly-Moore Paint Company was founded in 1946 by William Moore and William
 13 Kelly. It manufactured and sold paint, primarily to contractors and builders. The company was
 14 incorporated in California in 1952, at which time Mr. Kelly retired and sold his interest in the
 15 company to Mr. Moore. Declaration of Dan Stritmatter in Support of Motion For Summary
 16 Judgment by Defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co. Inc. ESOP
 17 Plan Committee and CIG ESOP Plan Committee ("Stritmatter Decl.") ¶¶ 3, 5, Ex 1 (Report of
 18 Investigation: K-M Industries Holding Co. Inc ESOP, U.S. Department of Labor, Pension and
 19 Welfare Benefits Administration, dated August 23, 2006 ("DOL Report").²

20 At the times of the transactions at issue, Kelly-Moore Paint Company owned a subsidiary
 21 named California Capital Insurance Company ("CCIC"). CCIC wrote property and casualty
 22

23
 24 ² The DOL Report was created in connection with a review by the Department of Labor ("DOL") of
 25 the KMH ESOP. The DOL found, and KMH corrected, certain procedural and documentary issues.
 26 The DOL closed its review with a letter that concluded that "no further action by the Department is
 27 warranted ... since you have taken the above noted corrective actions." Stritmatter Decl. ¶ 6, Ex. 2.
 28 Although the DOL was informed by plaintiffs' lawyer that he intended to file a complaint
 challenging the propriety of the 1998 and 1999 transactions, the DOL declined to investigate the
 transactions "since the stock transactions ... are outside the statute of limitations." DOL Report at
 16.

1 insurance policies in the states of California, Oregon and Nevada. The management of CCIC and
 2 the Paint Company were totally independent. Stritmatter Decl. ¶ 4; Declaration of Peter Cazzolla in
 3 Support of Motion For Summary Judgment by Defendants K-M Industries Holding Co., Inc., K-M
 4 Industries Holding Co. Inc. ESOP Plan Committee and CIG ESOP Plan Committee (“Cazzolla
 5 Decl.”) ¶¶ 3-4; DOL Report at page 3.

6 During 1998, two ESOPs were established, one for the Paint Company and one for CCIC.
 7 Cazzolla Decl. ¶ 5, Ex 1; Stritmatter Decl. ¶ 7, 8, Ex. 3; Declaration of Stephen Ferrari in Support of
 8 Motion For Summary Judgment by Defendants K-M Industries Holding Co., Inc., K-M Industries
 9 Holding Co. Inc. ESOP Plan Committee and CIG ESOP Plan Committee (“Ferrari Decl.”) ¶ 4, Ex
 10 1.

11 In 1999, the transaction was restructured and the two ESOPs were merged. As part of the
 12 restructuring process, the Kelly-Moore Paint Company changed its name to K-M Industries Holding
 13 Co., Inc. and formed a new subsidiary named Kelly-Moore Paint Company, Inc. to which it
 14 transferred all of its paint operations. Stritmatter Decl. ¶ 8, Ex. 3; Cazzolla Decl. ¶ 3. The newly-
 15 formed KMH had two classes of stock, “P” stock and “T” stock, designed to track the performance
 16 of what became the two KMH “first tier” operating subsidiaries: Kelly-Moore Paint Company and
 17 California Capital Insurance Company.³ Stritmatter Decl. ¶ 7, Ex. 3 (attached Amended and
 18 Restated Articles of Incorporation of Kelly-Moore Paint Company, Inc.)

19 The original Paint Company ESOP was renamed the K-M Industries Holding Co., Inc.
 20 Employee Stock Ownership Plan (“KMH ESOP” or “KMH Plan”) and the CCIC ESOP was merged
 21 into the KMH ESOP and thereafter ceased to exist. Stritmatter Decl. ¶ 8, Ex 4 at page 1 (“KMH
 22 Plan document”). Defendant KMH became the sponsor of the KMH Plan. KMH Plan document at
 23 page 1.

24
 25
 26 ³ California Capital Insurance Company was later renamed California Insurance Group, and then
 27 again renamed Capital Insurance Group. For the purposes of this motion, the company will be
 28 referred to as Capital Insurance Group or CIG. Cazzolla Decl. ¶ 1; see DOL Report at 2.

1 When the CCIC Plan and the Paint Company Plan were established in 1998, two Committees
 2 had been established to administer the ESOPs. William Moore was named as each Committee's
 3 sole fiduciary member. Cazzolla Decl. ¶ 5, Ex 1; Stritmatter Decl. ¶ 9, Ex 5.

4 When the CCIC Plan was merged into the Paint Company Plan, the CCIC Plan Committee
 5 ceased to exist. The Paint Company Plan Committee continued in existence as the Committee
 6 administering the KMH Plan. KMH Plan document at page 56. The sole member of the KMH Plan
 7 Committee remained William Moore until he was replaced as Committee member in February 2003.
 8 Stritmatter Decl. ¶ 9, Ex 5.

9 This motion is made on behalf of defendant KMH, as well as on behalf of defendants K-M
 10 Industries Holding Co., Inc. ESOP Plan Committee and CIG ESOP Plan Committee (the "Plan
 11 Committees."⁴ (KMH and the Plan Committees are sometimes collectively referred to herein as
 12 "KMH defendants."))

13 B. THE ESOP STOCK TRANSACTIONS

14 The final structure of the ESOP called for it to purchase 42% of the KMH "P" stock on
 15 behalf of the participating K-M Paint employees and 42% of the KMH "I" stock on behalf of the
 16 participating CIG employees. In order to comply with the requirement that the purchase price not
 17 exceed "fair market value," the Plan's Trustee secured outside valuations of the stock to be
 18 purchased. *See* 29 U.S.C. § 1108(e).

19
 20 ⁴ Even if the statute of limitations had not run on the claims against the two Committee defendants,
 21 these claims would have to be dismissed. A Plan committee is as a matter of law not a proper
 22 defendant in a breach of fiduciary duty case under ERISA because it is not a "person" as defined
 23 under ERISA § 3(9), 29 U.S.C. § 1002(9). *Tatum v. R.J. Reynolds Tobacco Company*, 2007 WL
 24 1612580, 40 Employee Benefits Cas. 2683 (M.D.N.C. 2007). Moreover, there was never an entity
 25 called the "CIG Plan Committee." The only entity to which this could refer is the Committee
 26 appointed to administer the CCIC Plan, which ceased to exist when the Plan was merged into the
 27 KMH Plan. Moreover, the only member of either Committee during the time of the 1998 and 1999
 28 transactions was William Moore. Mr. Moore died in 2004, well before plaintiffs filed their initial
 complaint. DOL Report at page 5. Assuming that the plaintiffs intended to sue the Committee
 members themselves, subsequent members of the KMH Committee cannot be held liable under
 ERISA for the acts of prior Committee members that took place before they joined the Committee.
 29 U.S.C. § 1109(b). With no individuals that may be held liable and the Committees themselves
 not proper defendants, the claims against the two Committee defendants would have to be dismissed
 even they were not barred by the statute of limitations.

Based on the values determined by the appraisers, the following two transactions took place:

1. On October 13, 1998, the ESOP purchased 42% of the shares of KMH "P" stock for \$232 million ("the 1998 ESOP sales transaction");

2. On October 18, 1999, the ESOP purchased 42% of the shares of KMH "T" stock for \$55 million ("the 1999 ESOP sales transaction").

III. ALLEGATIONS OF THE COMPLAINT

Each of the allegations against the KMH defendants contained in plaintiffs' two claims for relief concern breaches of duty relating to the ESOP's two purchases of KMH stock that occurred in 1998 and 1999, more than six years before the plaintiffs filed their original complaint. As to each of these two stock purchase transactions, the plaintiffs allege:

1) that the defendants caused the Plans to pay more than fair market value for KMH stock in violation of ERISA § 404(A)(1), 29 U.S.C. § 1104(A)(1); and

2) that the defendants engaged in a "prohibited transaction" by failing to ensure that the KMH Plan paid fair market value for the stock in violation of ERISA §§ 406, 408(e), 29 U.S.C. §§ 1106, 1108(e).

Complaint, ¶¶ 67, 74, 75.

Although the plaintiffs' Complaint also includes a list of acts performed while preparing for the two ESOP transactions that are alleged to be breaches of duty, the only injury claimed flows entirely from the two alleged breaches stated above. See Complaint, ¶¶ 67, 74, 75.

IV. ARGUMENT

A. STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.Pro. 56(c). If a properly supported motion for summary judgment is made, "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must ... set out specific facts showing a genuine issue for trial." Fed.R.Civ. Pro. 56(e)(2).

Summary judgment is appropriate to resolve an issue of law such as application of the statute of limitations in a case in which resolution of the issue does not involve disputed material facts. *See Delbon Radiology v. Turlock Diagnostic Center*, 839 F.Supp.1388, 1391 (E.D.Cal. 1993).

It is undisputed that the present case was filed more than six years after the 1998 and 1999 ESOP transactions that form the basis of plaintiffs' claim of injury to the ESOP. The KMH defendants are therefore entitled to summary judgment on each of plaintiffs' claims on the ground that they are barred by the six-year ERISA statute of repose.

B. ALL CLAIMS AGAINST THE KMH DEFENDANTS ARE BARRED BY THE SIX YEAR STATUTE OF REPOSE

Both of plaintiffs' claims for relief arise under ERISA provisions governed by 29 U.S.C. § 1113, which provides (emphasis added):

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of -

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

The six year period created by section 1113 is a "statute of repose," establishing an outside limit of six years within which to file suit and serving as "an absolute barrier to an untimely suit." *Radford v. General Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998). As the Ninth Circuit has recognized, while the 3-year statute of limitation of section 1113(2) does not run until the plaintiff possesses actual knowledge of the alleged breaches, the defendants' "interest in repose" is protected by the six year time period of section 1113(1), whether or not the plaintiffs ever discovered the alleged breaches. *Landwehr v. Dupree*, 72 F.3d 726, 733 (9th Cir. 1995).

In discussing the manner in which statutes of limitations and statutes of repose such as contained in section 1113 interact, the Ninth Circuit has explained that unlike a statute of

1 limitations, which “bars a plaintiff from proceeding because he has slept on his rights, or otherwise
2 been inattentive ... a statute of repose proceeds on the basis that it is unfair to make somebody
3 defend an action long after something was done or some product was sold. It declares that nobody
4 should be liable at all after a certain amount of time has passed, and that it is unjust to allow an
5 action to proceed after that.” *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1087 (9th Cir. 2001).

6 Therefore, unlike an analysis involving a statute of limitations, application of a statute of
7 repose such as the six-year period within which to sue created by section 1113 does not involve
8 questions concerning when the plaintiffs had knowledge of the breach, or when they were injured.
9 Instead, a statute of repose focuses solely on the length of time that has passed since the acts which
10 form the basis of plaintiffs’ complaint. In this case, Congress has decided that except in a case
11 involving fraud or concealment, a defendant has a right to repose that prevents suits from being
12 brought more than six years after the ESOP transactions in question.

13 It is undisputed that the original complaint in this action was filed on November 29, 2006,
14 more than 6 years after the 1998 and 1999 transactions that are alleged to constitute violations of
15 ERISA. There is no evidence of fraud or concealment by the KMH defendants. Plaintiffs’ claims
16 are therefore barred by section 1113.

17 **1. Plaintiffs’ claims are time barred because the “date of the last action**
18 **which constituted a part of the breach or violation” occurred more than**
19 **six years before the original complaint was filed**

20 Application of section 1113 requires the Court to define “the last action” that constituted part
21 of the alleged breach of duty. “To apply the limitations period, we must first isolate and define the
22 underlying violation upon which ... [plaintiff’s] claim is founded.” *Zeigler v. Connecticut General*
Life Ins. Co., 916 F.2d 548 (9th Cir. 1990).

23 Each of the allegations in plaintiffs’ two claims for relief concern breaches of duty relating to
24 the ESOP’s two purchases of KMH stock in 1998 and 1999, more than six years before the plaintiffs
25 filed their original complaint. As to each of these transactions, the plaintiffs allege: 1) that the
26 defendants caused the Plans to pay more than fair market value for KMH stock; and 2) that the
27
28

1 defendants engaged in a “prohibited transaction” by failing to ensure that the KMH Plan paid fair
2 market value for the stock. Complaint, ¶¶ 67, 74, 75.⁵

3 Both of plaintiffs’ claims for relief are based upon a single allegation – that the defendants
4 breached their fiduciary duties by causing the Plan to pay more than fair market value when it
5 purchased the stock in 1998 and 1999. *See Henry v. Champlain Enterprises, Inc.*, 288 F.Supp.2d
6 202, 226 f.11 (N.D.N.Y. 2003) [noting that the basis of a claim of a prohibited ESOP sales
7 transaction “seems to largely, if not entirely, mirror” the basis of a claim of breach of fiduciary duty
8 by causing the ESOP to pay more than fair market value].

9 As counsel for the Plaintiffs put it in a brief recently filed in this action, “the basic allegation
10 in this case [is] that the ESOP paid too much for the stock at the time of the initial transactions.”
11 Reply Brief in Support of Plaintiffs’ Motion for Class Certification and Appointment of Class
12 Counsel, filed June 19, 2008.

13 Once the purchases had been consummated, the alleged breaches of duty had occurred and
14 were actionable. *Davidson v. Cook*, 567 F.Supp. 225, 234 (D.C.Va. 1983) [six-year statute began to
15 run at date of loans on claims based on allegations that loans were prohibited transactions]; *also see*
16 *Zeigler, supra*, 916 F.2d at 551 [breaches of fiduciary duty arising out of terms of investment
17

18 ⁵ Although the Complaint recites a long list of alleged breaches of fiduciary duty, such as failing to
19 undertake an adequate and independent valuation of the KMH stock prior to the transactions, failing
20 to investigate adequately the qualifications of the valuation experts retained and failing to ensure
21 that they secured an independent expert assessment of the fair market value of KMH stock prior to
22 the transactions, these alleged breaches all occurred before the transactions in question. See, e.g.,
23 Complaint, ¶¶ 67, 74-76. The two exceptions are the allegations contained in paragraph 48-50 that
24 CIG’s alleged failure in 2006 to honor its “put option” to purchase plaintiff Smith’s shares
25 constitutes a breach of duty, and the allegations in paragraph 45 that in 2003 and 2004, the
26 defendants failed to obtain a proper valuation of the Series I and Series P stock held by the KMH
27 Plan and file IRS Form 5500s. These afterthought allegations cannot act to change the fact that the
28 plaintiffs’ claims are barred because they are brought more than 6 years after the transactions
claimed to have caused damage to the Plan. The relief sought by the Complaint is in connection
with the alleged “overpayment” by the ESOP for the shares of KMH stock. See Complaint, ¶¶ 69,
81. Allegations of unrelated breaches of duty that occurred after the stock transactions in question
cannot act to toll the statute of limitations on claims that the transactions themselves constituted
violations of law. *Cf. Hunt v. Magnell*, 758 F.Supp. 1292, 1299 (D.Minn. 1991) [Breaches of duty
allegedly occurring after the purchase of a trust asset do not toll the statute of limitations for claims
of fiduciary breach arising out of trustee’s failure to adequately investigate prior to purchase].

1 agreement occur at time of agreement]; *Larson v. Northrop Corp.*, 21 F.3d 1164, 1170 (D.C.Cir.
2 1994) [six-year statute began to run at date of purchase of allegedly inadequate annuity].

3 The “last acts” that constituted a part of the alleged breaches were the completion of the
4 sales transactions in 1998 and 1999. Once these transactions had closed, the price that the ESOP was
5 to pay had been established. If the ESOP ended up paying more than fair market value, as the
6 plaintiffs allege, then this happened more than six years before the original complaint was filed in
7 November 2006.

8 **2. The alleged breaches of duty are acts, not omissions**

9 Plaintiffs attempt to plead around the fact that they sued more than six years after the
10 transactions in question by characterizing a list of acts done as part of the process of setting the price
11 at which the stock would be sold as separate duties that the defendants allegedly “failed” to
12 accomplish. These allegations include such preparatory tasks as obtaining an adequate and
13 independent valuation of the KMH stock prior to those transactions, adequately investigating the
14 qualifications of valuation experts retained to prepare the valuations of KMH stock in connection
15 with the transactions and securing an independent expert assessment of the fair market value of
16 KMH stock prior to those transactions. Complaint, ¶¶ 28-33, 36-44. Plaintiffs also allege that the
17 defendants failed to “correct” or “cure” the alleged violations. See Complaint, ¶¶ 51, 67, 74, 75.

18 The KMH defendants expect that plaintiffs will argue that these “failures” trigger the
19 provisions of subsection 1113(1)(B), which states that “in the case of an omission,” a plaintiff must
20 sue “six years after ... the latest date on which the fiduciary could have cured the breach or
21 violation.”

22 First of all, it should be clear that simply alleging that a defendant “failed to cure” a breach
23 of fiduciary duty such as engaging in a prohibited transaction cannot convert that transaction into an
24 “omission.” If this were true, any participant could defeat the six-year statutory limitation of
25 subsection (1)(A) by simply recasting the alleged breach of duty into a subsequent failure to cure.
26 Any defendant who was accused of acting in violation of fiduciary duties who did not agree with the
27 accusation would have “failed to cure” the alleged breach, thus effectively reading the six year time
28 limit of subsection 1113(1)(A) out of the statute.

1 Subsection (1)(B) must be read to require that the “omission” that tolls the running of the
2 six-year period during the time in which the omission could be “cured” be an independent violation
3 of ERISA – not merely the “failure to remedy” an act concerning which the time to sue would
4 otherwise have run from the date of the act itself. *See Librizzi v. Children's Memorial Medical*
5 *Center*, 134 F.3d 1302, 1307 (7th Cir. 1998) [holding that “cure” as used in subsection (1)(B) cannot
6 be interpreted as meaning the failure to “provide a remedy” for a breach that has already occurred,
7 “lest §1113(1)(B) mean that the time never runs out.”]

8 As for the other “failures to act” alleged by the plaintiffs, there were many tasks done by
9 many people in preparation for and as part of the two stock transactions that comprise the gravamen
10 of plaintiffs’ Complaint. Together, these acts resulted in and led to the allegedly damage-causing
11 event itself, the sale of the stock. The plaintiffs cannot wait more than six years after these two sales
12 and then attempt to plead around the statute of repose merely by converting allegations that
13 defendants’ performance of certain acts was “inadequate” into allegations that defendants “failed to
14 perform” these acts.

15 This was the conclusion reached in *Keen v. Lockheed Martin Corp.*, 486 F.Supp.2d 481
16 (E.D.Penn. 2007), in which the district court held that subsection 1113(1)(A) barred a claim that
17 failing to provide benefits to contingent employees violated ERISA. Confronted with an argument
18 that the breach of duty being sued upon was not the decision about providing benefits, but the
19 “failure to individually assess their eligibility as common law employees and to inform plaintiffs of
20 this possible eligibility” (486 F.Supp.2d at 492), the court held that the plaintiff could not transform
21 through artful pleading a decision not to provide benefits into an “omission”:

22 This argument obfuscates the real issue: that defendants made a categorical decision
23 to deny benefits to contingent workers who were common law employees, even
24 though this decision purportedly violated the very terms of defendants’ benefit
plans.... In other words, defendants’ “failure” to assess is tantamount to defendants’
decision not to provide benefits to any contingent workers....

25 There are no allegations suggesting that the defendants “simply overlooked” doing these so-
26 called “omitted acts.” For example, the defendants here did not “fail” to get a valuation of the KMH
27 stock prior to the transactions, and did not “fail” to investigate the qualifications of independent
28

1 valuation experts retained to prepare the valuations of KMH stock in connection with the
2 transactions. Such valuations and investigations were indeed performed.

3 An allegation that defendants “failed to adequately perform” these acts does not convert the
4 acts into “omissions.”

5 **3. The six-year limitations period cannot be extended by alleging that a**
6 **“failure to cure” constituted a “continuing violation”**

7 Plaintiffs repeatedly allege that defendants failed to “correct” or “cure” the alleged
8 violations, thereby “continuing the breaches of fiduciary duty that began in 1998,” and that these
9 failures to cure are in fact “part of” the 1998 and 1999 stock transactions. See Complaint, ¶¶ 51, 67,
10 74, 75.

11 These allegations may presage an argument that such “failures to cure” can act to re-start the
12 six year time period as “continuing violations.” Such an argument must be rejected for an obvious
13 reason: in a case involving an allegation that an ESOP overpaid for shares that it purchased, a
14 plaintiff could wait 10, 20 or even 50 years to allege that the action constituted a breach of fiduciary
15 duty, simply claiming that the defendant fiduciary “failed to cure the breach” and that such failure
16 “continues the breach” and is “part of” the breach. Any such argument must be rejected as an
17 exception that swallows the six-year rule.

18 The application of a “continuing violation” theory to extend the ERISA limitations period
19 based merely on a failure to remedy an alleged violation was rejected by the Ninth Circuit in
20 *Phillips v. Alaska Hotel and Restaurant Employees Pension Fund*, 944 F.2d 509, 520 (9th Cir 1991).

21 Although *Phillips* involved an attempt to use a “failure to cure” to trigger the application of
22 the “continuing violation” theory to the three-year period of subsection (2), and not the six-year
23 period of subsection (1), the rationale behind the court’s decision is equally applicable to the present
24 situation. The concurring opinion of Circuit Judge O’Scannlain describes this rationale:

25 In response to these arguments, the plaintiffs insist - and the district court held - that
26 this suit involves allegations of a “continuing violation” and that the applicable
27 limitations period therefore never expired. As our opinion correctly points out,
28 however, this argument is overbroad. *See ante* at 521-22. If the “continuing
violation” rationale that we have applied in other contexts were as broad as the
plaintiffs and the district court suggest, the “actual knowledge” provision in the
statute would be superfluous and virtually no breach would ever grow stale so long as

1 it remained unremedied. The plaintiffs and the district court have confused the
 2 failure to *remedy* the alleged breach of an obligation with the commission of an
 3 alleged *second* breach, which, as an overt act of its own, recommences the limitations
 4 period.

5 *Phillips, supra*, 944 F.2d at 522-523, O’Scannlain, Justice (concurring), emphasis in original.

6 The same would be true if a mere “failure to cure” were enough to continually re-trigger the
 7 provision of subsection (1) regarding the “last act” that was part of the breach: “virtually no breach
 8 would ever grow stale so long as it remained unremedied.” A failure to remedy is not the same as a
 9 separate breach of duty. *Librizzi v. Children’s Medical Center, supra*, 134 F.3d at 1307.

10 In *Bergmann v. BMC Industries, Inc.*, 2006 WL 487864 at *3 (D.Minn.), the district court
 11 agreed, rejecting the application of the “continuing violation” theory to the six-year period of
 12 subsection (1). The district court cited *Phillips* in holding that the mere failure to correct an alleged
 13 breach of duty does not constitute a “continuing violation” that restarts the statute of limitations in
 14 the absence of a new and independent violation inflicting a new injury. *Id.* at *3.

15 Any invitation to interpret the time period within which to sue under ERISA as completely
 16 open ended in every case in which the defendant has not “cured” the alleged breach of duty must be
 17 rejected.

18 **4. There is no proof of “fraud or concealment”**

19 **a) Legal Standard**

20 Section 1113 provides an exception to the rule that a breach of fiduciary claim is barred if
 21 brought more than six years after the date of the last action which constituted a part of the violation:
 22 “except that in the case of fraud or concealment, such action may be commenced not later than six
 23 years after the date of discovery of such breach or violation.”

24 The “fraud and concealment” exception to section 1113 triggers the heightened pleading
 25 requirements of Federal Rule of Civil Procedure 9(b). *Larson v. Northrop Corp.*, 21 F.3d 1164,
 26 1170, 1173 (D.C.Cir. 1994); *DeFazio v. Hollister, Inc.*, 2008 WL 958185, at *3 (E.D.Cal.). In order
 27 to rely on the “fraud and concealment” exception to section 1113, Rule 9(b) requires a plaintiff to
 28 plead the specific content, time and place of any statements involved in the fraud or active
 concealment. *DeFazio v. Hollister, Inc., supra*. At the very least, Rule 9(b) requires that plaintiffs

1 “differentiate their allegations when suing more than one defendant ... and inform each defendant
2 separately of the allegations surrounding his alleged participation in the fraud.” *DeFazio v.*
3 *Hollister, Inc., supra.*

4 Plaintiffs’ allegations fall far short of meeting this standard. In fact, the Complaint makes no
5 attempt to state specific instances of fraud or concealment or to tie any instance of fraud and
6 concealment to a specific defendant or defendants. KMH defendants, and the Court, are left with
7 the task of sorting through the Complaint to match various allegations with possible claims against
8 specific defendants.

9 The Ninth Circuit joins the majority of courts in interpreting the “fraud or concealment”
10 language of section 1113 as incorporating the federal common law of fraudulent concealment.
11 *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995) (“*Barker*”); *see J. Geils*
12 *Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1254, 1253 (1st Cir.1996);
13 *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994); *Radiology Center v. Stifel, Nicolaus*
14 *& Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990); *Schaefer v. Arkansas Medical Society*, 853 F.2d 1487,
15 1491 (8th Cir. 1988). One consequence is that “the exception applies only when the defendant
16 himself has taken steps to hide his breach of fiduciary duty.” *Id.*, emphasis added.

17 In order to prove the “fraud” necessary to toll the statute, it must be proven that the KMH
18 defendants “made knowingly false misrepresentations with the intent to defraud the plaintiffs.”
19 *Barker, supra*, 64 F.3d at 1401. In order to prove “concealment,” the plaintiff must produce
20 evidence of “affirmative steps by [the KMH defendants] to conceal any alleged fiduciary breaches.”
21 *Id.*

22 The “active concealment” required by section 1113 “is more than merely failure to disclose,”
23 and requires that “defendants engaged in a course of conduct designed to conceal evidence of their
24 alleged wrongdoing,” and that plaintiffs “were not on actual or constructive notice of that evidence,
25 despite their exercise of due diligence.” *Schaefer v. Arkansas Medical Society, supra*, 853 F.2d at
26 1491-1492.

1 In order to toll the six-year limitations period of section 1113, “[t]here must be active
 2 concealment – i.e., some trick or contrivance intended to exclude suspicion and prevent inquiry.
 3 *Concealment by mere silence is not enough.*” *Larson v. Northrop Corp.*, *supra*, 21 F.3d at 1173,
 4 emphasis in original.

5 The Complaint contains no allegations that the KMH defendants “made knowingly false
 6 misrepresentations with the intent to defraud the plaintiffs” (*see Barker, supra*, 64 F.3d at 1401), and
 7 no evidence exists that such representations were made. After extensive discovery, production of
 8 over 43,000 documents by parties and third party witnesses and depositions of the key witnesses and
 9 company employees, no evidence of “fraud or concealment” has been uncovered.

10 **b) There is no evidence of concealment of the facts underlying the**
 11 **alleged breaches.**

12 The first step in any analysis of whether facts concerning an alleged breach of duty were
 13 actively concealed must be the identification of the facts that underlie the alleged breaches. As
 14 explained above, although plaintiffs allege a myriad of separate breaches of duty, they all relate to
 15 the two purchases of stock by the ESOP in 1998 and 1999. The gravamen of plaintiffs’ Complaint is
 16 the allegation that the stock purchases involved a breach of fiduciary duty (and constituted
 17 “prohibited transactions”) because “the Plan paid substantially more than fair market value for the
 18 KMH stock purchased from the Moore Family Trust in 1998 and 1999.” Complaint, ¶ 51. This is
 19 the only allegation that plaintiffs claim caused injury to the ESOP.

20 Even if one were to assume solely for the purposes of this motion that this allegation were
 21 true, the statute of limitations requires that summary judgment be granted on each of plaintiffs’
 22 claims. In order to avoid ERISA’s six-year time limitation, plaintiffs would have to prove that the
 23 KMH defendants knowingly made false statements concerning the alleged overpayments or actively
 24 concealed information upon which plaintiffs’ allegations are based. There is no evidence to support
 25 any such misrepresentation or active concealment on the part of the KMH defendants.
 26
 27
 28

1 **(1) Allegations relating to qualifications and knowledge of valuers**

2 Plaintiffs' allegations of breaches of duty connected with the qualifications of the
3 independent valuers are simply a rote laundry list of all of the possible ways that such a duty can
4 be breached. These include: (1) failure to secure an independent expert assessment of the fair
5 market value of the stock (§§ 28, 36); (2) failure to adequately investigate the qualifications the
6 valuers (§§ 29, 37); (3) failure to provide complete and accurate information to the valuers (§§
7 30, 38); and (4) failure to make certain that reliance on the valuations was justified (§§ 31, 39).

8 Plaintiffs' Complaint does not allege a single instance of fraud or concealment in connection
9 with any of these allegations. There is no evidence that would support a finding that the KMH
10 defendants used "some trick or contrivance intended to exclude suspicion and prevent inquiry" into
11 these allegations, or pursued "a course of conduct designed to conceal evidence of their alleged
12 wrongdoing." There certainly is no evidence of any intentional misrepresentations of the
13 qualifications of these valuers or the specific information provided to them. In fact, there is no
14 evidence of any representations to the Plan participants at all concerning any of these matters.
15 "Mere silence is not enough" to establish concealment under section 1113. *Larson v. Northrop*
16 *Corp., supra*, 21 F.3d at 1173.

17 Summary judgment must be granted as to these alleged breaches of duty.

18 **(2) Allegations relating to the adequacy of the valuations**

19 In order to support their contention that the KMH defendants both breached their fiduciary
20 duties and caused the ESOP to enter into a "prohibited transaction" because the sale of the stock was
21 for more than its fair market value, the plaintiffs must show that the valuations that supported the
22 sales prices were incorrect. Plaintiffs' Complaint makes two attacks on these valuations. Both of
23 these are barred by the six year time limit of section 1113.

24 **(a) Failure to properly discount the value of the stock**

25 Plaintiffs allege that the valuations improperly inflated the value of the stock by failing to
26 "discount the purchase price of the stock to account for the fact that the stock purchased ... was
27
28

1 tracking stock, which generally trades at a discount relative to ordinary common stock.” Complaint,
 2 ¶¶ 33, 41.

3 Again, there are no allegations in the Complaint alleging fraud or concealment concerning
 4 this allegation, or any other subject matter related to the methodologies used by the valutors in
 5 reaching their conclusions. There is no evidence of any representations, true or false, made to the
 6 Plan participants concerning discount rates or specific methodologies employed in the valuations.
 7 There was no fraud or concealment of the facts upon which this allegation is based.

8 The KMH defendants are entitled to summary judgment on any claims of breach of fiduciary
 9 duty based upon allegations concerning the use of discount rates or any other methodologies
 10 employed by the valutors.

11 (b) Failure to account for asbestos-related litigation

12 Plaintiffs’ final attack on the valuations, and the final basis for their allegation that the stock
 13 was sold to the ESOP at more than fair market value, is that the valuations “failed to take into
 14 account KMH’s potential liability in asbestos-related litigation, even though information that the
 15 company faced significant liability was known to KMH management....” Complaint, ¶¶ 32, 40.

16 In an effort to plead around the six-year statute of repose, plaintiffs allege “upon information
 17 and belief” that “KMH management intentionally withheld information about the extent of KMH’s
 18 potential asbestos liability from [Plan] participants.” Complaint, ¶ 52. KMH defendants assume that
 19 plaintiffs will argue that by “withholding this information” from the participants, the KMH
 20 defendants engaged in the type of “fraud or concealment” that will toll the statute of limitations.

21 Although not at issue here, KMH defendants deny that the valuations failed to take into
 22 account the asbestos liabilities of the company. Although the issue of the knowledge of the KMH
 23 defendants in 1998 and 1999 concerning Kelly-Moore’s potential asbestos liability will certainly be
 24 contested should this case proceed to trial, this issue is also not before the Court at this time.⁶

25
 26 ⁶ Although primarily a company that manufactured and sold paint products, in 1968 Kelly-Moore
 27 purchased a company by the name of Paco that manufactured drywall sealing materials and patching
 28 compounds. Until the late 1970s, these products contained asbestos. Declaration of Henry I.
 Bornstein in Support of Motion For Summary Judgment by Defendants K-M Industries Holding

1 Whatever may have been known by the company about its potential asbestos liability and
 2 insurance coverage in 1998 and 1999, the relevant question here is whether the KMH defendants
 3 made any intentional misrepresentations about what they knew then about the asbestos situation and
 4 whether there was any scheme to conceal the state of affairs as they understood them. In order to
 5 invoke the “fraud or concealment” exception to the statute of repose, there must be evidence that the
 6 KMH defendants either lied to the ESOP participants about or actively concealed facts about what
 7 they knew in 1998 or 1999 about the company’s asbestos liabilities with the intent to conceal the
 8 alleged breaches of duty, i.e., the alleged overpayments for the stock.

9 There is no evidence of any misstatements (or any statements at all) by the KMH defendants
 10 to the ESOP participants about the asbestos situation as it existed in 1998 and 1999. There is also
 11 no evidence of any scheme to conceal information about the company’s knowledge concerning the
 12 asbestos situation at the time of the ESOP transactions.⁷

14 Co., Inc., K-M Industries Holding Co. Inc. ESOP Plan Committee and CIG ESOP Plan Committee
 15 (“Bornstein Decl.”) ¶ 4, Ex. 1, Deposition of Herbert R. Giffins, March 28, 2008 (“Giffins Depo.”)
 16 pages 47:13-48:13. As a result of its ownership of Paco, at the time of the 1998 and 1999 ESOP
 transactions, the company was the defendant in numerous asbestos liability cases.

17 Should this case proceed to trial, the evidence will show that at the time of the ESOP formation,
 18 these cases were considered a minor problem and just another product liability issue similar to those
 19 faced by the company every day. They were being defended by the company’s insurers, and were
 typically being dismissed without payment or settled for small amounts, typically no more than
 20 \$500. Bornstein Decl. ¶ 5, Ex. 2, Deposition of Joseph Cristiano, April 8, 2008 (“Cristiano Depo.”),
 page 109:12-22; Declaration of Joseph Cristiano in Support of Motion For Summary Judgment by
 21 Defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co. Inc. ESOP Plan
 Committee and CIG ESOP Plan Committee (“Cristiano Decl.”) ¶ 3. In 1998 and 1999, the company
 22 had numerous layers and levels of primary and excess insurance coverage in amounts of hundreds of
 millions of dollars to protect its assets against asbestos claims, and reasonably believed that it had
 23 ample insurance coverage to prevent the asbestos lawsuits from having a material effect on the
 company’s finances. Ferrari Decl. ¶¶ 5, 6, 8, 11.

24 ⁷ If this case were to proceed to trial, the evidence will show that at the time of the two ESOP
 25 transactions, Kelly-Moore management believed that the company had ample insurance to cover any
 26 future asbestos liabilities. The evidence will also show that as this conclusion began to be called
 into doubt, far from concealing this information, the company took great pains to disclose to the
 27 ESOP participants the state of affairs with respect to the potential asbestos liability and how it could
 affect the value of the ESOP shares. See Ferrari Decl., Cristiano Decl., Stritmatter Decl, Cazzolla
 28 Decl.

1 The three plaintiffs agree. Plaintiff Thomas Fernandez answered “no” when asked if
 2 anything has come to his attention “that causes you to believe that the company, CIG, that is,
 3 attempted to conceal the concerns that the CIG ESOP stock might be negatively impacted by the
 4 asbestos litigation.” Bornstein Decl. ¶ 6, Ex. 3, Deposition of Thomas Fernandez, April 21, 2008, at
 5 pages 103:23-104:16. Plaintiff Lora Smith agreed, testifying that it was not her impression that CIG
 6 “was trying to be sneaky and hide something” from her about the asbestos situation. Bornstein
 7 Declaration ¶ 7, Ex. 4, Deposition of Lora Smith, April 16, 2008, pages 163:22-164:4. Plaintiff
 8 Tosha Thomas, when asked if Kelly-Moore was doing the best it could to keep former employees
 9 such as her “informed about matters pertaining to the Kelly-Moore ESOP,” replied “To the best of
 10 my knowledge, yes.” Bornstein Decl. ¶ 8, Ex. 5, Deposition of Tosha Thomas, April 18, 2008, at
 11 pages 164:24-165:7.

12 In the absence of any evidence that the KMH defendants lied to the participants about what
 13 they knew in 1998 and 1999 about Kelly-Moore’s asbestos liability, or that they embarked upon
 14 some scheme to conceal this information, the six year statute of repose mandates that summary
 15 judgment be granted on plaintiffs’ claims to the extent they are based upon the issue of whether the
 16 1998 and 1999 valuations adequately considered the company’s potential asbestos liability.

17 V. CONCLUSION

18 It is undisputed that the two transactions upon which Plaintiffs sue occurred more than six
 19 years before the complaint was filed. There is no evidence of fraud or concealment of the facts
 20 underlying the alleged violations of duty. Plaintiffs’ claims are barred by ERISA’s six year statute
 21 of repose and the KMH defendants are entitled to summary judgment on all of plaintiffs’ claims.

22 Dated: June 26, 2008

Respectfully submitted,

LOVITT & HANNAN, INC.

24 By: 

Henry I. Bornstein

26 Attorneys for Defendants K-M Industries
 27 Holding Co., Inc.; K-M Industries Holding Co.,
 28 Inc. ESOP Plan Committee; and CIG ESOP
 Plan Committee